STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	:	
	:	**ICC Docket No. 11-0710**
In re Proposed Contracts Between Chicago Clean Energy, LLC and Ameren Illinois Company and Between Chicago Clean Energy, LLC and Northern Illinois Gas Company for the Purchase and Sale of Substitute Natural Gas Under the Provisions of Illinois Public Act 97-0096	:	

VERIFIED JOINT REPLY OF CHICAGO CLEAN ENERGY, LLC AND THE ECONOMIC DEVELOPMENT INTERVENORS IN FURTHER SUPPORT OF THEIR MOTION IN LIMINE REQUESTING A RULING REGARDING THE ILLINOIS COMMERCE COMMISSION'S LIMITED AUTHORITY TO MODIFY THE FINAL DRAFT SOURCING AGREEMENT AND IMPOSE ADDITIONAL CONDITIONS UPON CHICAGO CLEAN ENERGY, LLC

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March 23, 2012

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Chicago Clean Energy, LLC ("Chicago Clean Energy" or "CCE"), by and through its attorneys, DLA Piper LLP (US), and the Economic Development Intervenors ("Economic Development Intervenors" or "EDI"), by and through their attorneys, the Law Office of Michael A. Munson, pursuant to the schedule set by the Chief Administrative Law Judge ("Chief ALJ") of the Illinois Commerce Commission ("Commission"), hereby reply to the Responses filed by the Commission Staff ("Staff"), the Illinois Power Agency ("IPA"), Northern Illinois Gas Company ("Nicor"), and Ameren Illinois Company ("Ameren"), and in further support of their Joint Motion in Limine (the "Joint Motion in Limine") seeking an interim order on rehearing acknowledging the Commission's limited authority to modify the Final Draft Sourcing Agreement and the Commission's lack of authority to impose additional conditions upon Chicago Clean Energy, state as follows:

I.

INTRODUCTION

The Commission should not allow for further delay in fully addressing the fundamental legal issue in this proceeding: defining the Commission's authority under the relevant statutory provisions. Chicago Clean Energy and EDI have set forth a straightforward, efficient approach to litigating the matters on rehearing. This approach allows for full, unfettered litigation of the threshold issue, resulting in the issuance of Ruling by the Chief ALJ, an opportunity for the parties to file and the Commission to rule upon a Petition for Interlocutory Review, followed by two rounds of verified comments, a Proposed Order, Briefs on Exceptions, and a Final Order on Rehearing applying that legal authority. That approach is efficient and fully consistent with Commission practice – indeed, an analogous approach already has been used by the Commission in this very case, where an Interim Order was issued on preliminary matters, followed by a Final Order being issued about a month later on additional issues. (*See* Interim Order dated December 7, 2011; Final Order dated January 10, 2012.)

Responses to the Joint Motion in Limine were filed by the Staff, the IPA, Nicor, and Ameren. Staff does not engage on the substantive issue of the Commission's legal authority to modify the IPA-approved final draft sourcing agreement, reserving judgment on that issue, though acknowledging that CCE and EDI's position may indeed be correct, and also committing to pursue measures to have this entire matter put before by the Commission by its May 2, 2012, meeting. (*See* Staff Response at ¶¶ 3, 7.) Chicago Clean Energy and EDI appreciate Staff's willingness to expedite the proceeding, but respectfully note that based upon the briefing schedule set by the Chief ALJ (to which neither Staff nor any party objected), the substantive issue regarding the Commission's legal authority is now before the Chief ALJ.

With the exception of a single, brief argument offered by Nicor, none of the Responses makes any attempt to engage substantively on the subject raised in the Joint Motion in Limine: namely, the scope of the Commission's legal authority under the relevant statute. Instead, those Responses incorrectly suggest that Chicago Clean Energy and EDI are seeking some sort of preferential treatment in the rehearing process by having the baseline legal issue in the case determined up front in the rehearing process. (*See, e.g.,* Nicor Response at 1.) The Responses also question whether a "Motion in Limine" is the correct title to put on a motion advocating an orderly approach to litigating the rehearing, and the Responses somehow come to the conclusion that if the label is incorrect then the approach suggested and the relief sought must be incorrect as well. (*See, e.g.,* Ameren Response at ¶ 1.)

Both arguments lack credibility. Plainly, there is no "preference" sought by Chicago Clean Energy or EDI with respect to the question of legal authority – the matter was presented here by a Motion in Limine served on *all* parties, and the Chief ALJ set a briefing schedule that allows *all* parties the opportunity to express their views on the subject, to which no party objected. It is commonplace in litigated matters before the Commission and the Courts to deal with various questions – including legal questions – prior to the final order in a case. *Sander v. Dow Chem. Co.,* 166 Ill. 2d 48, 65. 651 N.E.2d 1071, 2079 (1995) (endorsing the use of trial court pre-trial directions "to facilitate the prosecution of cases and narrow the issues in order to expeditiously reach a disposition which fairly vindicates the rights of the parties."). Further, the Commission's Rules of Practice specifically provide for taking steps that "may aid in the simplification of the evidence and disposition of the proceeding," (83 Ill. Admin. Code 200.300(a)(7)), and specifically contemplate the submission of "prehearing briefs on specified issues." (83 Ill. Admin. Code 200.310(a).) The suggestion that resolution of the threshold

question of the Commission's legal authority *must* wait until the Commission's Final Order on Rehearing is totally unsupported.

Similarly, the suggestion that the title of the "Motion in Limine" was incorrect and thereby dooms the substantive relief requested puts form over function to a degree that is not contemplated by the Commission or Illinois Courts. (*See, e.g., Interstate Power and Light Company*, ICC Docket No. 07-0246*,* November 28, 2007 Final Order at 4-5 (reviewing and endorsing pre-hearing use of a motion in limine on legal issues in a Commission proceeding); *People v. Illinois Commerce Comm'n*, 2012 WL 926143, at *5 (2d Dist. March 19, 2012) (rejecting the argument that a different name on a substantively identical utility rider had legal significance).)

Without conceding that the pleading should have had a different title, the substance of the relief sought – i.e., a threshold determination of the Commission's legal authority under the relevant statute –plainly and unmistakably was set forth in the Joint Motion in Limine, and no party purports to be confused or unable to respond on the substantive legal question. Thus, the level of "concern" expressed about the use of the "Motion in Limine" label is overblown and unproductive.

Finally, Nicor's assertion that the Commission has the authority to modify the "billing determinants" in the IPA-approved final draft sourcing agreement ignores both the plain meaning of the Act as well as the Senate and House Resolutions. (*See* 220 ILCS 5/9-220(h-4); HR 755, SR 585.) Interestingly, Nicor's argument is limited to suggesting that the Commission can modify the "billing determinants" used to calculate certain charges, conceding that the Commission has no authority to modify other provisions or impose further obligations upon Chicago Clean Energy. (*See* Nicor Response at 3-4.) However, just as with the remainder of the

terms, the "billing determinants" were clearly and explicitly established in the IPA-approved final draft sourcing agreement; the Act prohibits the Commission from modifying this term.

Chicago Clean Energy and EDI respectfully request that the Commission grant the Joint Motion in Limine and clearly articulate the limits that the General Assembly has placed upon the appropriate issues to be addressed in the instant proceeding.

II.

THE COMMISSION SHOULD ADDRESS THE THRESHOLD ISSUE REGARDING THE SCOPE OF ITS AUTHORITY TO MODIFY THE IPA-APPROVED FINAL DRAFT SOURCING AGREEMENT

The Joint Motion in Limine provides an appropriate, efficient mechanism for the Commission to provide a guide to the parties regarding how the proceeding is to be conducted on rehearing. Specifically, the Commission will be able to clearly indicate its view of whether it possesses any authority beyond that given to in Section 9-220(h-4) of the Act to modify the terms of the IPA-approved final draft sourcing agreement. If, and only if, the Commission concludes that it has such authority would the parties present comments regarding specific proposed revisions to the IPA-approved final draft sourcing agreement. That is, if the Commission determines that it lacks the authority to make the revisions, then comments regarding specific proposed revisions beyond those identified in Section 9-220(h-4) would be unnecessary and irrelevant to this proceeding on rehearing. This is a classic example of using appropriate pre-hearing procedure to narrow issues in the interest of simplification, judicial efficiency, and conservation of the parties' resources.

A. A Motion In Limine Is An Appropriate Mechanism To Efficiently Manage The Proceeding On Rehearing By Defining, At The Threshold, What Is Relevant

The Responses incorrectly assert that the Joint Motion in Limine may not be the appropriate vehicle for the Commission to address its legal authority to modify the IPA-approved final draft sourcing agreement. (*See* Nicor Response at 1-2; Ameren Response at 2; IPA Response at 2; Staff Response at 2.) By mischaracterizing both the relief requested and the historic use of motions in limine, the Responses improperly criticize the form of the Joint Motion in Limine.

Far from seeking to choke off analysis or prevent any party from fully addressing the underlying legal issues as suggested in some of the Responses, Chicago Clean Energy and EDI have invited a robust analysis of the Commission's legal authority. That is, with the Joint Motion in Limine, Chicago Clean Energy and EDI are not seeking preferential treatment of their issues, but rather are requesting that the Commission engage in an orderly review of the issues. As such, the Joint Motion is entirely appropriate, and in line with the Commission's Rules of Practice. (*See* 83 Ill. Admin. Code 200.25 ("Standards of Discretion" which include considerations of "expedition", "convenience", and "cost-effectiveness"); *see also* 83 Ill. Admin. Code 200.300(a)(7) (endorsing procedures that "may aid in the simplification of the evidence and disposition of the proceeding"); 83 Ill. Admin. Code 200.310(a) (endorsing submission of "prehearing briefs on specified issues.").)

While the most common use of motions in limine may be to prevent the introduction of prejudicial evidence, Ameren and Staff incorrectly assert that the *only* purpose of such motions is to protect a jury from hearing unduly prejudicial evidence. (*See* Ameren Response at 2, Staff Response at 2.) However, it is a matter of black letter law that motions in limine "serve other

purposes as well, such as . . . more careful consideration of evidentiary issues . . .. and, by resolving potentially critical issues at the outset, enhancing the efficiency of trials." (Scott D. Lane, et al. Illinois Motions in Limine § 1:1 (2011-12 ed.) That is, a motion in limine properly can be used to address any evidentiary issue, not just to preclude prejudicial evidence, but also to define the subject matter that is to be addressed within the proceeding. (*See, e.g., Swick v. Liautaud*, 169 Ill. 2d 504, 521, 662 N.E.2d 1238, 1246 (1996) (affirming the trial judge's discretion to grant a motion in limine after determining that the evidence was irrelevant to the issues in the case).)

Indeed, the Commission previously has endorsed the use of a motion in limine in a similar situation, to set forth the appropriate subject matter to be addressed subsequently in the proceeding. (*See Interstate Power and Light Company*, ICC Docket No. 07-0246 (hereinafter "*IPL*"), November 28, 2007 Final Order at 4-5.) In *IPL*, at the outset of the proceeding, the Commission was presented with a motion in limine which requested that the Commission define the bounds of its authority to address issues concerning a transmission owner's financing. (*See id.*) The motion in limine resulted in a ruling that recognized the limited scope of the Commission's authority, and defined the remaining (more limited) scope of the proceeding. The Commission endorsed that procedure, as well as the substantive finding in the ruling on the motion in limine, in its Final Order. (*See id.*; *see also* ICC Docket No. 03-0022, Illinois Electric Transmission Company's February 22, 2003 "Motion in Limine Regarding Matters within Exclusive Federal Jurisdiction".)

The relief requested in the Joint Motion in Limine is simultaneously to clarify issues *and* to limit presentation of comments only to those issues relevant to the resolution of matters within the Commission's jurisdiction. That is, the Joint Motion in Limine was explicitly designed to

limit the comments to relevant issues. The fact that the Responses suggest other parties' have a different interpretation of what is "relevant" does not make the request to limit evidence improper. Indeed, the very function of a motion in limine properly is to help define the scope of relevant evidence. (*See, e.g., Guski v. Raja*, 409 Ill. App. 3d 686, 701-02, 949 N.E.2d 695, 709-10 (1st Dist. 2011) (affirming a motion in limine the excluded testimony as irrelevant)).

Finally, Nicor improperly asserts, without citation, that if the Joint Motion in Limine were granted, the Chief ALJ would be required to issue a Proposed Interim Order. (*See* Response at 2 n.1.) This simply is not the case, as demonstrated by *IPL*. Just as the ALJ issued a Ruling in *IPL*, the Chief ALJ can issue a Ruling defining the scope of issues to be raised in the verified comments. Significantly, issuing such a Ruling (rather than a Proposed Interim Order) would not result in a dismissal of the proceeding on rehearing, since the Commission still would have to determine what specific language changes should be made to satisfy the direction given in Section 9-220(h-4) of the Act (e.g. removal of the improper early termination agreements as well as correcting the typographical and scrivener's errors). Thus, the Chief ALJ's Ruling would not be making a "final determination" in the proceeding and is within his authority. (*See* 83 Ill. Admin. Code 200.500(d).)

Interests of administrative efficiency and issue simplification would be well served by proceeding to address the threshold legal issues set forth in the Motion in Limine, and nothing in the parties' Responses effectively rebuts that approach. Accordingly, Chicago Clean Energy and EDI respectfully request that the Commission grant the Joint Motion in Limine.

B. Assuming *Arguendo* That The Motion Is Mislabeled, The Commission Nonetheless Should Address The Threshold Issue Regarding The Scope Of Its Authority To Modify The IPA-Approved Final Draft Sourcing Agreement Before The Parties Submit Comments Addressing Specific Proposed Revisions

Setting aside the label of the instant motion, it simply makes sense for the Commission to define the scope of its authority prior to the parties submitting comments regarding specific proposed revisions to the IPA-approved final draft sourcing agreement. That is, parties should not have to expend time and resources debating an issue before the Commission if the Commission does not have the authority to grant the relief that is being requested. Consistent with the schedule approved by the Chief ALJ, parties now have had an opportunity to present their legal arguments regarding the Commission's legal authority; once the Commission rules on the instant Joint Motion in Limine, the parties should be required to focus their verified comments upon specific revisions that the Commission is authorized to make.

Additionally, addressing this issue regarding Commission's authority is a threshold legal issue that should not be delayed until further in the rehearing process. It appears some parties may be attempting to improperly postpone consideration of this fundamental legal issue regarding the Commission's authority until later, when the Commission should be focused upon the factual questions related to the way in which the IPA-approved final draft sourcing agreement should be finalized. Instead of delaying consideration in a way in which might obscure this touchstone legal issue, the Commission can and should properly address the issue now, ***before*** the parties file their verified comments.

In short, the Commission should not allow parties' claims of an improper title prevent the Commission from endorsing a sensible approach to conducting the rehearing.

III.

THE COMMISSION LACKS THE STATUTORY AUTHORITY TO MODIFY THE IPA-APPROVED FINAL DRAFT SOURCING AGREEMENT EXCEPT AS EXPLICITLY AUTHORIZED IN SECTION 9-220(h-4)

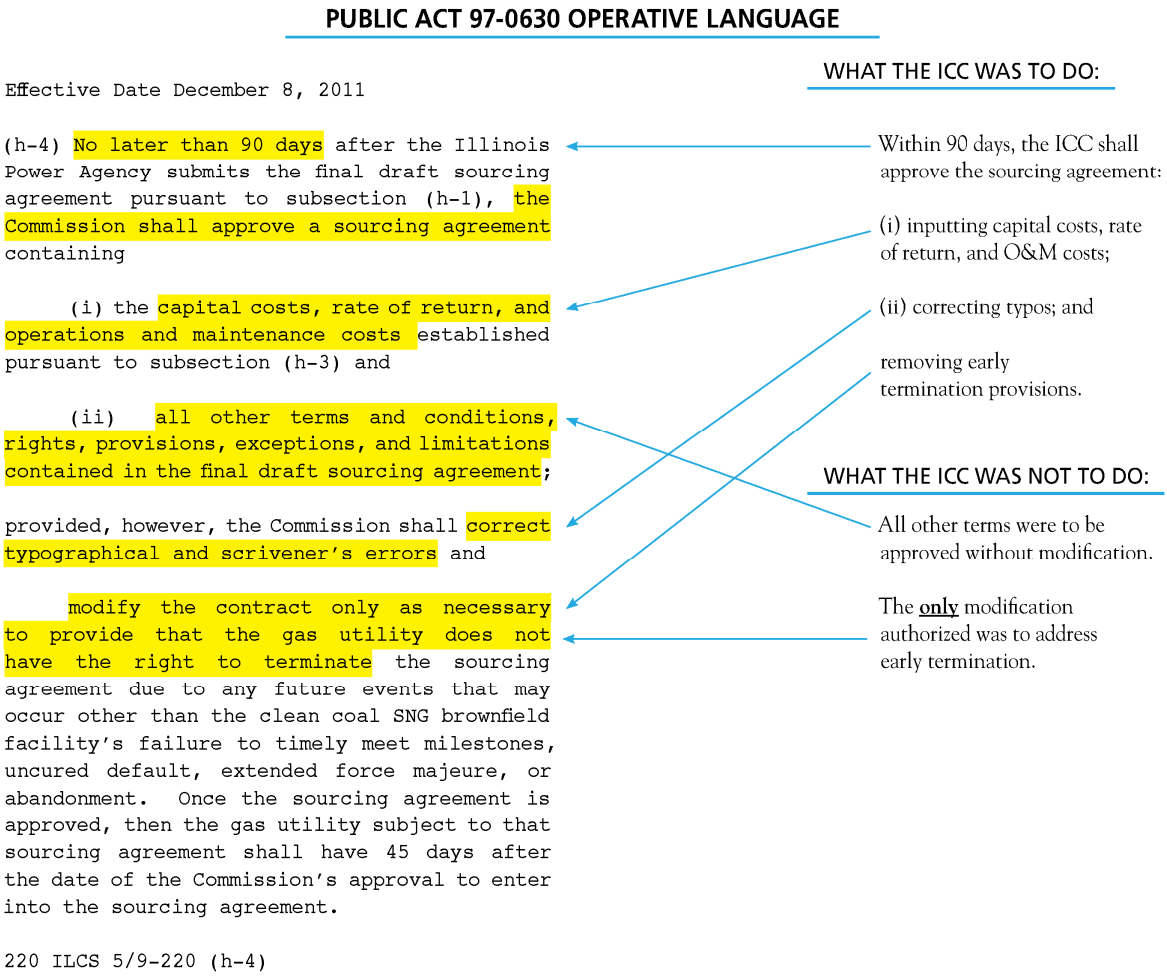
Significantly, no party other than Nicor took issue with the substantive analysis in the Motion in Limine of the Commission's authority to modify the IPA-approved final draft sourcing agreement. Having failed to respond, the parties other than Nicor have waived their opportunity to object to that analysis. (*See, e.g., Ameren Illinois Co. v. Illinois Commerce Comm'n*, 2012 Ill. App. 4th 100,962, ¶101, 2012 WL 844529, *17 (4th Dist. 2012) (citing Sup. Ct. R. 341(h)(7) ("Points not argued are waived.").) Moreover, Nicor only asserts that the Commission has the authority to modify the "billing determinants" term. (*See Heard v. City of Chicago*, 265 Ill. App. 3d 493, 496, 637 N.E.2d 684, 686 (1st Dist. 1994) (a specific objection waives all other grounds not specified).)

. Thus, there is no question whether the Commission's authority to modify the IPA-approved final draft sourcing agreement is limited. The *only* question now is the scope of the limitations placed upon the Commission by the General Assembly. The answer is found in the plain meaning of the Act. To the extent the Commission needs to confirm that answer, the Senate and the House each passed a Resolution to provide further guidance. Accordingly, Chicago Clean Energy and EDI respectfully request that the Commission: (i) define its limited authority to modify the IPA-approved final draft sourcing agreement, and (ii) acknowledge its lack of authority to impose additional conditions upon Chicago Clean Energy.

A. The Act Unambiguously Limits The Commission's Authority

As explained in the Motion in Limine, the General Assembly enacted a statute that delineates with specificity both what the Commission is authorized to do, as well as what the

Commission is not to do at this point of the sourcing agreement approval process. (*See* 220 ILCS 9-220(h-4).) There is nothing open-ended about Section 9-220(h-4). It is very specific:



The level of specificity in Section 9-220(h-4) is unmistakable, and stands in stark contrast to other provisions of the Act regarding the Commission's authority. The plain terms of P.A. 97-0630 provide that to the extent there were ***any*** prior determinations made by the IPA (other than with regard to the early termination provisions), the Commission was not to modify those terms except as to correct typographical and scrivener's errors. That is, the General Assembly

explicitly constrained the Commission's authority by requiring that the Commission approve "***all other terms and conditions***, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement [that was submitted to the Commission by the IPA]." (220 ILCS 5/9-220(h-4) (emphasis added).)

The Joint Motion in Limine explains in detail the legal impact of the statutory language, which is, of course, well known to the participants in this proceeding. (*See* Motion in Limine at 5-8, 10-11.) Other than Nicor's brief statement about billing determinants, discussed below, none of the Responses made any attempt to engage on this fundamental issue properly brought before the Commission. The bottom line is that in the context of the statutory framework established by the General Assembly, the Commission's role, though important, is limited and specific. Commission action beyond that limited and specific role is unauthorized and unlawful.

B. To The Extent There Is Any Ambiguity, The Commission Can And Should Rely Upon The Senate And House Resolutions

To the extent that the Commission finds there is any ambiguity in the plain terms of Section 9-220(h-4), the Commission should look to the Resolutions passed by the Senate and the House, which were attached as Attachment A to the Motion in Limine. (*See, e.g., Miller v. LaSalle Bank N.A.*, 595 F.3d 782, 790 (7th Cir. 2010) (subsequent legislative pronouncements on an "unclear statute" are entitled to be "respectfully considered.").)

Remarkably, in its Response Nicor states that: "[T]he recent Resolutions of the General Assembly cited in the Join Motion (at 4, 8-9), or the comments or a particular legislator at a Commission meeting, is of no precedential or persuasive value, and cannot be used to interpret those provisions on rehearing." (Nicor Response at 4.) In other words, Nicor takes the position that the Commission, which is required by statute to hear public comment at its meetings, should ignore completely the obviously relevant, multiple statements of members of the General

Assembly offered during the public comment portion of recent Commission meetings. That defies common sense, and calls into question the entire basis for the public comment period at Commission meetings. Presumably persons speaking at those meetings -- elected state representatives included -- are doing so for a purpose other than to be completely ignored, as Nicor would have it.

Moreover, and even more incredibly, Nicor takes the position that the Commission, an administrative body authorized and empowered by the General Assembly of the State of Illinois, need not even consider the obviously relevant, recent Resolutions passed by both the Illinois House and Senate. Nicor suggests that the Commission may only consider "contemporaneous" facts surrounding the passage of the legislation, citing the following language:

> *Aids in ascertaining legislative intent include such factors as reason for enactment, contemporaneous conditions, existing circumstances, and remedy sought.*

(*Olney Trust Bank v. Pitts*, 200 Ill. App. 3d 917, 922-23 (5th Dist. 1990), cited at Nicor Response at 5 (emphasis in Nicor's Response).) Nicor somehow misconstrues the partial list of aids in statutory construction as being all-inclusive, and suggests that the phrase "contemporaneous conditions" should somehow be read to mean that ***all aids*** in ascertaining legislative intent ***must*** occur at the exact moment the legislation is enacted. Construing the language of *Olney Trust Bank* as such is a faulty reading of the court's ruling that simply does not make any sense. Indeed, the language cited by Nicor quite obviously *requires* the Commission to consider the House and Senate Resolutions:

- The first and second "Whereas" clauses of each of those Resolutions describes the "**contemporaneous conditions**" and "**existing circumstances**" relating to the statutory framework established by the General Assembly relating to the Chicago Clean Energy project.
- The third, fourth, and fifth "Whereas" clauses of each of those Resolutions explains the "**reason for enactment**" of Public Act 97-0630.
- Each Resolution generally, as well as the second "Resolved" clause in each Resolution in particular explains the "**remedy sought**" by the General Assembly in enacting the legislation relating to the Chicago Clean Energy project.

Significantly, these Resolutions were adopted by the same General Assembly that passed the underlying legislation, and were adopted in direct response to the January 10, 2012 Order in the instant proceeding.

In the face of the extraordinary efforts of the General Assembly collectively as well as particular General Assembly members individually to respectfully but clearly communicate the intended legislative intent to the Commission – to the extent not clear on the face of the statute – Nicor's suggestion that everything simply be ignored is unpersuasive and lacks credibility.

C. The Commission Does Not Have The Authority To Modify The Billing Determinants That Were Established In The IPA-Approved Final Draft Sourcing Agreement

Nicor's Response asserts that the Commission has some additional authority to modify the "billing determinants" that were established in the IPA-approved final draft sourcing agreement. (Nicor Response at 3-4.) Neither the Response of Staff nor that of any other party reaches this conclusion. In making its assertion, Nicor ignores the reasoned decision of the IPA, the plain meaning of the Act, and the Resolutions passed by the Senate and the House.

The term "billing determinants" or "pricing determinants" refers to the denominator in the calculation used to derive the per-MMBtu charges for capital and O&M recovery. This, in turn, determines the maximum percentage of the facility's costs to be recovered from the utilities under the terms of the sourcing agreement. It is a maximum percentage because the profits from any sales above the Annual Output allocated to Ameren and Nicor customers will be split evenly between the customers' Consumer Protection Reserve Account and Chicago Clean Energy. Thus, the "billing determinants" are a critical component of the sourcing agreement, and were discussed at length during the IPA-sponsored mediation that and specifically addressed in both the IPA-approved final draft sourcing agreement and the IPA's memorandum that was transmitted to the Commission with the IPA-approved final draft sourcing agreement. (*See* IPA Final Draft Sourcing Agreement at 21; IPA Memorandum to the Commission and Capital Development Board dated October 11, 2011 (the "IPA Memorandum") at 17-18.)

1. The IPA-approved Final Draft Sourcing Agreement Clearly Addressed The "Billing Determinants" Term

As noted in the IPA Memorandum, "There was significant dispute between the parties' proposed terms relating to pricing. Foremost among the disagreement is the allocation of contract volume that is required to be purchased under the sourcing agreement." (IPA Memorandum at 17.) The IPA-approved final draft sourcing agreement resolved this dispute, and endorsed a compromise position that CCE had offered in the mediation, providing for a billing determinant of 43.5 bcf, and an effective 95% cost recovery. (*See* IPA Final Draft Sourcing Agreement at 21.)

As explained in the IPA Memorandum, "for the purposes of the pricing determinants, CCE has agreed that it would not rely on the [projected annual output of] 47,799,714 MMBtu as a price determinant. Instead, for purposes of setting any pricing formula, CCE will agree to use

the volume of []43,500,000 [mcf] in determining any price factor. This is reflected in the formulas adopted in Schedules 5.2A and 5.2B. The IPA has also incorporated language into Article V relating to CCE's proposal." (IPA Memorandum at 18.). The language that the IPA incorporated into Article V of the final draft sourcing agreement clearly set the billing determinants for the capital and O&M charges:

- "For purposes of determining the Capital Component, the Annual Contract Quantity will be 43.5 Bcf." (*See* IPA Final Draft Sourcing Agreement at 21.)
- "For purposes of determining the O&M Component, the Annual Contract Quantity will be 43.5 Bcf." (*See id.*)

These two terms in the IPA-approved final draft sourcing agreement unambiguously require that when the Capital Component and the O&M Component are calculated, the dollar amounts should be divided by 43.5 bcf (equivalent to 42,064,500 MMBtu) in order to determine the per-unit charges. The Schedules 5.2A and 5.2B in the IPA-approved final draft sourcing agreement then show mechanically how this calculation is to occur.

Nicor asserts that since the IPA-approved final draft sourcing agreement included references to the capital recovery charge and O&M charge as a "$[X.XX] per MMBtu" the "Commission ***must*** decide the number of billing determinants to be used in the computation." (Nicor Response at 4. (emphasis added).) Nicor's assertion is a non sequitur. While it is true that the IPA-approved final draft sourcing agreement did not calculate the dollar amount for these charges, it is only because the IPA did not have before it the *numerator* (e.g. the total costs) to calculate the charges. The denominator (e.g., the "billing units") clearly was decided by the IPA. That is, at the time the IPA approved the final draft sourcing agreement, the IPA did not have the total capital and O&M costs to be included in the numerator; the total costs were to be

determined using the inputs from the Capital Development Board ("CDB") that were developed after the IPA-approved the final draft sourcing agreement. The Commission then was to take the inputs from the CDB, plug those into the IPA-approved final draft sourcing agreement, and approve the charges on a per unit basis, pending the input of the final cost of debt. Indeed, Nicor previously has conceded that the IPA did clearly set the billing determinants in the final draft sourcing agreements. In its Reply Brief on Exceptions, Nicor stated: "The IPA initially set the number of billing determinants in Section 5.2 of the Sourcing Agreement by directing that 43.5 Bcf be used as the Annual Contract Quantity…." (Nicor January 3, 2012 Reply Brief on Exceptions at 5.)

2. The Commission Was Not Authorized To Establish Or Modify The "Billing Determinants" Term In The IPA-approved Final Draft Sourcing Agreement

Nowhere in the Act is there any suggestion that the Commission is to establish the billing determinants or modify the prior determination of the IPA regarding the billing determinants. To the contrary, the Act requires that the IPA set the billing determinants. Section (h-1) of the Act describes all the terms which must be in the sourcing agreement, including "(9) A formula to translate the recoverable costs and charges under subsection (h-3) of this Section into the delivered SNG price per million btu." (220 ILCS 5/9-220(h-1).) The final draft sourcing agreement approved by the IPA therefore would have been incomplete and out of compliance with the Act if it had failed to include a billing determinant, which fulfills the role described in (h-1)(9) precisely. Further, the only authority given to the Commission to modify the IPA-approved final draft sourcing agreement relates to removing the improper early termination provision; the Act provides that "the Commission shall approve . . . ***all other terms and conditions***, rights, provisions, exceptions, and limitations contained in the final draft sourcing

agreement [that was submitted to the Commission by the IPA]." (220 ILCS 5/9-220(h-4) (emphasis added).)

Nicor further asserts that the Commission has been given the authority to modify the "billing determinants" term in the IPA-approved final draft sourcing agreement because Section 9-220(h-3)(1) and (2) provide for capital recovery charge and O&M costs to be "approved by the Commission." (*See* Nicor Response at 3.) According to Nicor, since the Act specifically mandates that the Commission use the inputs provided by the CDB, but does not specifically mandate that the Commission use the billing determinants established by the IPA, the Commission's authority to modify this term should be implied. (*See id.* at 4.) However, as an administrative agency that was created by statute, the Commission lacks any "implied powers" that would authorize it to modify this or any other term. (*See Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), *aff'd* 955 N.E.2d 1110 (Ill. 2011) ("The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction."); *see also Harrison Tel. Co. v. Ill. Commerce Comm'n*, 343 Ill. App. 3d 517, 523, 797 N.E.2d 183, 189 (5th Dist. 2003) (same), *aff'd* 212 Ill. 2d 237, 817 N.E.2d 479 (2004). *See also Landfill, Inc. v. Pollution Ctl. Bd.*, 74 Ill. 2d 541, 554, 387 N.E.2d 258 (1978); *see also Nat'l Marine Serv. Inc. v. Ill. Env. Prot. Ag.*, 120 Ill. App. 3d 198, 205-206, 458 N.E.2d 551 (4th Dist. 1983).) Rather, the Commission's powers "are limited to those granted by the legislature, so that any action taken by the [Commission] must be specifically authorized by statute[,]" and to the extent any decision is made without statutory power, "that decision is void." (*Alvarado v. Indus. Comm'n*, 216 Ill. 2d 547, 553-54, 837 N.E.2d 909, 914 (2005).)

Further, Nicor's argument ignores the language of Section 9-220(h-4), which explicitly direct that "the Commission shall approve" the "terms" in the IPA-approved final draft sourcing agreement and shall "modify the contract only as necessary [to remove the inappropriate early termination provisions]". (220 ILCS 5/9-220(h-4).) In its Application for Rehearing, Nicor clarifies that it is requesting that the Commission make even more modifications to the IPA-approved final draft sourcing agreement, calling for the wholesale deletion of the two key contract terms which set the billing determinants. (*See* Nicor Application for Rehearing at 5.) Only by ignoring the plain language of 9-220(h-4), which prohibits such a deletion, could this be accomplished.

To the extent the Commission believes there is any ambiguity, the Resolutions adopted by the Senate and the House clarify that the Commission had no further implied powers to modify the IPA-approved final draft sourcing agreement:

- "[T]he Illinois Commerce Commission in reviewing and approving sourcing agreements was only to: (1) fill in the blanks in the final draft sourcing agreement based upon the previously established capital costs, operations and maintenance costs, and the rate of return for the Chicago Clean Energy project; (2) remove two statutorily unauthorized early termination provision from the final draft sourcing agreement; and (3) correct typographical and scrivener's errors;"

- "No statutory authority was given to the Illinois Commerce Commission to modify the terms of the final draft sourcing agreement or impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-0096 and 97-0630;"

(HR 755, SR 585.)

In short, the Commission lacks the authority to modify the IPA-approved billing determinants, and any action to do so would be unlawful.

D. The Commission Lacks The Statutory Authority To Impose Additional Conditions Upon Chicago Clean Energy

As explained in the Joint Motion in Limine, the Commission lacks authority to modify the Annual Output or the Monthly Base Overage Amount provisions from the IPA-approved final draft sourcing agreement, or to impose the third party guarantee requirement, capital structure reporting requirement, and carbon sequestration requirement that were contained in the January 10, 2012 Order. Significantly, no party -- including Nicor -- took issue with the analysis in the Joint Motion in Limine which explained that the Commission lacks any authority to modify other provisions or impose additional conditions upon Chicago Clean Energy. Accordingly, Chicago Clean Energy and EDI respectfully request that the Commission enter an Interim Order on Rehearing acknowledging that the Commission lacks the legal authority to modify other provisions or impose additional conditions upon Chicago Clean Energy.

IV.

CONCLUSION

For the reasons stated herein, as well as in the Joint Motion in Limine, Chicago Clean Energy and the Economic Development Intervenors respectfully request that the Chief ALJ enter a ruling or the Commission enter an Interim Order on Rehearing acknowledging the Commission's limited authority to modify the IPA-approved final draft sourcing agreement and its lack of authority to impose additional conditions upon Chicago Clean Energy, and granting such further, additional or different relief as the Commission deems appropriate.

Respectfully submitted,

CHICAGO CLEAN ENERGY, LLC

By: _____
One of Its Attorneys

ECONOMIC DEVELOPMENT INTERVENORS

By: _____
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DATED: March 23, 2012

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

VERIFICATION

Christopher J. Townsend, being first duly sworn, on oath deposes and says that he is one of the attorneys for Chicago Clean Energy, LLC, that he has read the above and foregoing document, knows of the contents thereof, and that the same is true to the best of his knowledge, information and belief.

_____
Christopher J. Townsend

Subscribed and sworn to me
this ___ day of March, 2012.

_____

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

VERIFICATION

Michael A. Munson, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Economic Development Intervenors, that he has read the above and foregoing document, knows of the contents thereof, and that the same is true to the best of his knowledge, information and belief.

_____
Michael A. Munson

Subscribed and sworn to me
this ___ day of March, 2012.

_____